a

CITY GROWTH SDN BHD & ANOR

v.

THE GOVERNMENT OF MALAYSIA

b

HIGH COURT, KUALA LUMPUR
RAUS SHARIF J
[APPLICATION FOR JUDICIAL REVIEW NO: R2-25-148-2004]
1 SEPTEMBER 2005

c ***ADMINISTRATIVE LAW:*** *Exercise of administrative powers - Judicial review - Order of seizure of movable property made by deputy public prosecutor - Whether amendable to judicial review - Whether reviewable by way of judicial review - Anti Money Laundering Act 2000, s. 50(1) - Rules of the High Court 1980, O. 53 r. 3*

d ***ADMINISTRATIVE LAW:*** *Remedies - Certiorari - Order of certiorari to quash deputy public prosecutor's order of seizure of movable property - Whether orders of deputy public prosecutor a decision reviewable by way of judicial review - Anti Money Laundering Act 2000, s. 50(1) - Rules of the High Court 1980, O. 53 r. 3*

e This was the applicants' application for leave to commence proceedings under O. 53 r. 3 of the Rules of the High Court 1980 ('RHC'). The applicants were seeking for an order of *certiorari* to quash the order dated 5 July 2004 made by the deputy public prosecutor and served on Hong Leong Bank Berhad ('the Hong Leong order') and EON Bank Berhad ('the f EON Bank order) (collectively referred to as the said orders). The said orders purported to effect a seizure of, *inter alia*, movable property in the banking accounts of the applicants pursuant to s. 50(1) of the Anti Money Laundering Act 2000 ('AMLA'). The issue raised for determination was whether the said orders of the deputy public prosecutor dated 5 July 2004 g pursuant to s. 50(1) of AMLA was decision reviewable by way of judicial review.

Held (refusing applications for leave):

[1] Section 50(1) of AMLA is part and parcel of the investigation process h into an offence under s. 4(1) of AMLA. In order to facilitate the investigation into the offence of money laundering, the law has provided with the public prosecutor the power to assist the investigating officer. Section 50(1) of AMLA was enacted to enable the public prosecutor or his deputy to make an order of seizure of movable properties in

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the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. By issuing the said orders the deputy public prosecutor was merely exercising a function under AMLA. The deputy public prosecutor was performing his duties under s. 50(1) of AMLA and could not be accountable by way of judicial review. The order of the deputy public prosecutor was not reviewable under O. 53 of the RHC. (pp 427 c-e & 428 d)

Case(s) referred to:
Hj Ahmad Azam Mohamed Salleh & Ors lwn. Jabatan Pembangunan Koperasi Malaysia & Ors [2004] 4 MLJ 86 ***(refd)***
R v. Sloan [1990] 1 NZLR 474 ***(refd)***

Legislation referred to:
Anti Money Laundering Act 2000, ss. 44(1), 50(1)
Emergency (Crime Prevention and Public Safety) Ordinance 1969, s. 3(1)
Rules of the High Court 1980, O. 53 r. 3(3)

For the applicant/appellant - V Sithambaram (Chetan Lachman Jethwani with him); M/s Sri Ram & Co
For the respondent - Abd Rahim Uda SFC (Azizah Hj Nawawi SFC)

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif J:
This is an application by City Growth Sdn Bhd and Azam dan Azan Sdn Bhd (the applicants), for leave to commence proceedings under O. 53 r. 3 of the Rules of the High Court 1980 (RHC). Basically, the applicants are seeking for an order of *certiorari* to quash the order dated 5 July 2004 made by the Deputy Public Prosecutor and served on Hong Leong Bank Berhad (the Hong Leong Order) and EON Bank Berhad (the EON Bank Order) (collectively referred to as the said orders). The said orders purport to effect a seizure of, *inter alia*, movable property in the banking accounts of the applicants pursuant to s. 50(1) of the Anti Money Laundering Act 2000 (AMLA).

There are 3 other related matters involving the Hong Leong Order. There are:

(i) Kuala Lumpur High Court Judicial Review Application No. R1-25-151-2004 filed by Dynasty Domain Sdn Bhd against the Government of Malaysia (the Dynasty Domain Application);

(ii) Kuala Lumpur High Court Judicial Review Application No. R2-25-147-2004 filed by Prestigious Autoworld Sdn Bhd against the Government of Malaysia (the Prestigious Autoworld Application); and

(iii) Kuala Lumpur High Court No. R2-25-147-2004 filed by Luar Kota Development Sdn Bhd against the Government of Malaysia (the Luar Kota Application).

By an order of court given on 21 February 2005, the application herein and Prestigious Autoworld Application were ordered to be transferred and heard together with Dynasty Domain Application and the Luar Kota Application.

The facts leading to the four applications are these. On 26 March 2004, one Tee Yam was arrested by the police and detained pursuant to s. 3(1) of the Emergency (Crime Prevention and Public Safety) Ordinance 1969. While he was under police detection, the police on or about 5 April 2004 served an order under s. 44(1) of AMLA on Tee Yam (the Tee Yam s. 44 order). Subsequently on or about 14 April 2004 Tee Yam's wife, Chia Mee Sim, was also served with a similar order under s. 44(1) of AMLA.

The police then relied on the existence of Tee Yam s. 44 order to freeze the banking and financial accounts of companies linked to Tee Yam, which includes the applicants herein, Dynasty Domain Sdn Bhd, Prestigious Autoworld Sdn Bhd and Luar Kota Sdn Bhd.

By operation of law, the Tee Yam s. 44 order lapsed on 4 July 2004. However on 5 July 2004, the day after the Tee Yam s. 44 order lapsed, the Deputy Public Prosecutor issued and served the Hong Leong Order and EON Bank Order pursuant to s. 50(1) of AMLA to the applicants herein. The Hong Leong Order was also served on Dynasty Domain Sdn Bhd, Prestigious Autoworld Sdn Bhd and Luar Kota Sdn Bhd.

Hence, these companies filed their application for leave for judicial review. Subsequently, the applications were served on Attorney General Chambers pursuant to O. 53 r. 3(3) of the RHC. When the applications came up for hearing, Senior Federal Counsel Dato' Abdul Rahim bin Uda (Puan Azizah bte Haji Nawawi with her) appeared for the Attorney General. He raised several preliminary objections. His objections were:

(i) The Deputy Public Prosecutor, in exercising the power of the Public Prosecutor was merely performing a statutory function and did not make a decision;

(ii) That the decision of the Deputy Public Prosecutor was not a final determination of the issue at hand;

(iii) That the said orders were issued in the exercises of a non decision making duty;

(iv) That the revision of the said orders would be against public policy; and

(v) That the present proceedings are an abuse of process of the court.

Learned counsel for all the applicants contended that the said orders of the Deputy Public Prosecutor under s. 50(1) of AMLA is amendable to judicial review because:

(i) The Deputy Public Prosecutor was performing a public duty by enforcing the provision of AMLA;

(ii) The source of that the Deputy Public Prosecutor power is statutory, ie, AMLA; and

(iii) The Deputy Public Prosecutor in exercising the powers conferred by AMLA is under an obligation to act judiciously.

Thus, the crucial question that need determination is whether the said orders of the Deputy Public Prosecutor dated 5 July 2004 pursuant to s. 50(1) of AMLA is decision reviewable by way of judicial review.

In order to decide on the issue, it is necessary, and for ease of reference, to produce a copy of the order issued by the Deputy Public Prosecutor. The order reads as follows:

ANTI-MONEY LAUNDERING ACT 2001
(ORDER UNDER SUBSECTION 50 (1))

TO:

EON BANK BHD
11TH FLOOR, WISMA CYCLE & CARRIAGE
288, JALAN RAJA LAUT
KUALA LUMPUR

WHEREAS I, BUDIMAN LUTFI BIN MOHAMED being satisfied
(Name of Public Prosecutor/Deputy Public Prosecutor)

on the information given to me by DSP SURESH KUMAR G. SUPPIAH
(Name of Investigating Officer)

that the movable property including any monetary instrument or any accretion to it, as setout below:

1) Azam & Azan S/B – CA A/C No: 1610000029661

2) Azam & Azan S/B – HAD A/C No: 161000029678

3) City Growth S/B – (i) HAD No: 18100050991 (ii) HDA No: 18100051000 (iii) HAD No: 18100051017 (iv) HAD No: 18100051031 (v) HAD No: 18100051048

is evidence in relation to the commission of an offence under subsection 4(1) of the Anti-Money Laundering Act 2001 (the Act).

NOW PURSUANT to subsection 50(1) of the Act, it is hereby ordered that you, your employee or your agent are not to part with, deal in, or otherwise dispose of such property or any part of it until this Order is otherwise revoked or varied.

TAKE NOTICE THAT failure to comply with this Order is an offence under the Act.

Date: 5.7.04

sign
Signature of Public Prosecutor
Deputy Public Prosecutor

From the above, it can be seen that the Deputy Public Prosecutor's order was in pursuant to s. 50(1) of AMLA. Section 50(1) of AMLA is in the following words:

(1) Where the Public Prosecutor is satisfied on information given to him by an investigation officer that any movable property, including any monetary instrument or any accretion to it, which is the subject-matter of an offence under subsection 4(1) or evidence in relation to the commission of such offence, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

Looking at the order of the Deputy Public Prosecutor as well as the provision of s. 50(1) of AMLA, I am of the view that the order of the Deputy Public Prosecutor is not reviewable under O. 53 of the RHC. To me, s. 50(1) of AMLA is part and parcel of the investigation process into an offence under s. 4(1) of AMLA. I appears that in order to facilitate the investigation into the offence of money laundering, the law has provided with the Public Prosecutor the power to assist the investigating officer. Clearly, s. 50(1) of AMLA was enacted to enable the Public Prosecutor or his Deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. Thus, by issuing the said orders the Deputy Public Prosecutor was merely exercising a function under AMLA.

It has been said before that not all decisions and action of a public officer is reviewable by the court. In *R v. Sloan* [1990] 1 NZLR 474, Justice Hardie Boys said:

> ... it is not every decision made under statutory authority that is subject to judicial review. A decision must go beyond what is merely administrative or procedural ... or the exercise of a function rather than a power ... Quite plainly, the conclusions reached by the inspector here are of this kind and so are not reviewable. To hold otherwise would, as Mr Neave submitted, open up the investigation process of all law enforcement agencies to constant judicial review; and that cannot have been the intention of Parliament.

Similarly, in *Haji Ahmad Azam bin Mohamed Salleh dan 5 Lagi lwn. Jabatan Pembangunan Koperasi Malaysia dan 2 Lagi* [2004] 4 MLJ p. 86 I held that the public officers exercising a function under the Cooperative Societies Act 1993, is not reviewable under O. 53 of the RHC.

Likewise in this case, the order of the Deputy Public Prosecutor under s. 50(1) of AMLA is also not reviewable. This must be so, otherwise if all decisions and action of public authority of this nature are amendable to court's review, then the government machinery may not be able to function smoothly. The investigation process of all law enforcement agencies will be open to constant judicial review. To borrow the words of Justice Hardie Boys in *R v. Sloan (supra)* 'that cannot have been the intention of Parliament.'

It is submitted by learned counsel for all applicants that the issuing of the s. 50(1) order, the Deputy Public Prosecutor has crippled their business and has further failed to appreciate that the said orders would subject them and its directors and officers to liabilities resulting from their inability to utilize its funds. But as stated earlier, the s. 50(1) order is to secure the evidence for the purpose of criminal prosecution under s. 4(1) of AMLA. It is not an administration decision but a decision in relation to criminal investigation. Thus, the rights of all applicants in the four cases lies in the criminal, as well as civil law and not in an administration action. The Deputy Public Prosecutor was performing his duties under s. 50(1) of AMLA and cannot be made accountable by way of judicial review.

For the abovesaid reasons, the four applications for leave is refused with costs.